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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1489

STATE OF NEW JERSEY,

Petitioner,

vs.

JOSEPH S. PORTASH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
Point I—Respondent lost the benefit of privilege against self-incrimination by failing to testify before asserting the right with respect to immunized grand jury statements	12
Point II—The State should be permitted to impeach a defendant with materially inconsistent statements given after the grant of immunity	15
CONCLUSION	28
Appendix:	
Opinion of the Superior Court of New Jersey, Appellate Division	1a
Notice of Petition for Certification	11a
Notice of Appeal to the Supreme Court of New Jersey	13a
Order of the Supreme Court of New Jersey, Denying Certification	15a
Order of the Supreme Court of New Jersey, Dismissing Appeal	16a
Judgment of the Ocean County Court, Law Division	17a

PAGE

Cases Cited

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) 14

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 ..... 13, 14

Branzburg v. Hayes, 408 U.S. 665 (1972) 16

Bronston v. United States, 409 U.S. 352 (1973) 20

Brown v. United States, 356 U.S. 148 (1958) 18, 19

Communist Party of United States v. Subversive Activities Control Board, 367 U.S. 1,107 (1961) 13

Dombrowski v. Pfister, 380 U.S. 479 (1975) 15

Doyle v. Ohio, 426 U.S. 610 (1976) 18

Flast v. Cohen, 392 U.S. 83 (1968) 14

Garner v. United States, 424 U.S. 648 (1976) 13, 26

Glickstein v. United States, 222 U.S. 139 (1911) 17, 21

Harris v. New York, 401 U.S. 222 (1971) 9, 10, 20, 24, 25

Harrison v. United States, 392 U.S. 219 (1968) 18

Kastiger v. United States, 406 U.S. 441 (1972) 16, 17

Lawn v. United States, 355 U.S. 339 (1958) 16

McGautha v. United States, 402 U.S. 183 (1971) 18

Miranda v. Arizona, 384 U.S. 436 (1966) 20

Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) 16

Oregon v. Hass, 420 U.S. 714 (1975) 20

People v. Coleman, 13 Cal.3d 867, 120 Cal. Rptr. 384, 533 P.2d 1024 (Sup. Ct. 1975) 21

PAGE

Raffel v. United States, 271 U.S. 494 (1926) 18

United States v. Bryan, 339 U.S. 323 (1950) 21

United States v. Calandra, 414 U.S. 338 (1974) 16

United States v. Hockenberry, 474 F.2d 247 (3rd Cir. 1973) 24-26

United States v. Kahan, 415 U.S. 239 (1974) 22, 24

United States v. Mandujano, 425 U.S. 564 (1976) 17, 18

United States v. Monia, 317 U.S. 424 (1943) 13

United States v. Moss, 562 F.2d 155 (2d Cir. 1977), U.S. cert. filed Nov. 8, 1977 (No. 77-661, 22 Cr.L. 4112) 14, 23-25, 27

United States v. Tramunti, 500 F.2d 1334 (2d Cir. 1974) 22, 23, 26

United States v. Wong, —— U.S. ——, 97 S.Ct. 1823, 52 L.Ed.2d 231 (1977) 17

Walder v. United States, 347 U.S. 62 (1954) 20, 24

Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972) 17

United States Constitution Cited

Fifth Amendment 2, 12, 13, 15-18, 22

Sixth Amendment 12

Statutes Cited

L. 1975, c. 246, Sec. 2, as amended 3

N.J.S.A. 2A:81-17.2a2 (New Jersey Public Employees Immunity Statute) 3, 17

	PAGE
N.J.S.A. 2A:85-1	3
N.J.S.A. 2A:105-1	3
28 U.S.C.:	
Sec. 1257(3)	2

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The petitioner State of New Jersey respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in this proceeding on June 29, 1977.

Opinion Below

The following opinions of the state courts are reproduced in the appendix: the Orders of the Supreme Court

of New Jersey denying certification and dismissing the appeal, not yet reported; the opinion of the Superior Court of New Jersey, Appellate Division reported at 151 N. J. Super. 200, 376 A. 2d 950 (1977), and the unreported judgment of conviction of the Superior Court of New Jersey, Law Division.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on January 17, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 *U.S.C.* §1257(3).

Questions Presented

1. May a defendant invoke the benefit of the privilege against self-incrimination without having properly asserted it at trial?

2. Does the privilege against self-incrimination shield a defendant from cross-examination with his materially inconsistent statements given after he was granted immunity from the use of any adverse evidence derived from his grand jury testimony in any subsequent prosecution except for contempt, false swearing, or perjury?

Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment V

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *

New Jersey Public Employees Immunity Statute, N.J.S.A. 2A:81-17.2a2*

> If any public employee, having claimed the privilege against self-incrimination, testifies before any court, grand jury or the State Commission of Investigation after having been informed that his failure to appear and testify would subject him to removal from his office, position or employment, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury or false swearing committed while so testifying.

Statement of the Case

Respondent Portash was prosecuted for misconduct in office (contrary to N.J.S.A. 2A:85-1) and extortion by a public official (contrary to N.J.S.A. 2A:105-1). In September or October of 1972 his crime was discovered and reported to the police by Constance Kulpinski, an assistant bookkeeper at the Madison Agency, a realty and insurance brokerage firm in Lakewood, New Jersey. At the time Portash was a member of the Ocean County Board of Freeholders, a member of the Manchester Township Committee as well as mayor of that town, Executive Director of the Pinelands Environmental Council, and a self-appointed member of the Manchester Township Munici-

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* The statute was subsequently amended, L. 1975, c. 246, §2, to alter its self-executing nature.

pal Utilities Authority (See 2T33-11 to 25).* It was learned from Ms. Kulpinski and records of Madison Agency that Portash had accepted approximately $31,730, less taxes from Donald Safran, part-owner of the agency, for a "no show" job. The employment was a conduit for illegal payments by Leisure Technology Corporation, a major real estate developer in Ocean County, for favorable treatment by Portash in his capacity as a public official. The Madison Agency was a convenient intermediary, since the president of Leisure Technology, Robert Schmertz, was also a principal in the agency.

Following commencement of the investigation, it was represented to State law enforcement authorities that Portash was willing to discuss the matter and cooperate with them (2TH24-22 to 24; 3TGJ29-21 to 23). Accordingly, on October 29, 1974 the State subpoenaed certain documents from Portash relating to his employment at Madison Agency, including site evaluations. Portash, however, objected to the subpoena at an *in camera* hearing on November 6, 1974, on the ground that production of the documents would infringe his right against self-incrimination. The court rejected this argument and ordered Portash to produce and identify these documents before the State Grand Jury. Fearful that his client might be exposing himself to charges such as obstruction of justice for producing fabricated documents, Portash's attorney stated that his client would not represent their authenticity or accuracy (TH2-11 to 28-13).

Pursuant to another subpoena Portash appeared in court on November 14, 1974. Since the State considered

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* The State will utilize the same transcript designations as in its State Court briefs, see Appellate Division Brief at pp. 2-3 and Supreme Court Brief at p. 2.

his testimony desirable for the prosecution of Schmertz and Leisure Technology (2TH24-25 to 25-22), it agreed to grant immunity from use of any adverse evidence derived from his grand jury testimony in any subsequent prosecution except for contempt, false swearing or perjury. It was made clear to Portash, however, that evidence had been presented to a separate grand jury and no representation was made insofar as prosecution for offenses committed as shown by that evidence (2TGJ3-7 to 17). Respondent then testified before the State Grand Jury. The substance of his immunized testimony pertained to the documents he had submitted on November 6, 1974, which he admitted were fabricated after the State Police began investigating him in 1972 (3TGJ4-5 to 7-16). He also admitted that one of the letters relating to his employment which he had shown to Detective Feldherr (Exhibit SGJ17) had been prepared after the State investigation commenced and not at the time indicated on the letter (3TGJ13-21 to 15-3).

Approximately two weeks after Portash's grand jury testimony, "charge bargaining" discussions took place to avoid the necessity of his indictment (See 2TH34-1 to 5). These discussions incorporated several prerequisite conditions upon which there had been general agreement: Portash was to resign from his position as mayor of Manchester prior to January 1, 1975; he was expected to cooperate in the case including the prosecution of Schmertz and Leisure Technology, and most importantly from the State's viewpoint, he was to cooperate in the investigation of a contract between the Pinelands Environmental Council and Meridian Engineering which was deemed more significant than the instant case (2TH26-11 to 27-15). Very soon after these initial "charge bargaining" discussions, the State made it known that it would also require restitution of the amounts which Portash received through Madison Agency (2TH27-1 to 6).

Portash failed to honor his commitment to resign as mayor by January 1, 1975 (2TH27-15). Subsequently, there was a request to extend the date to February 1, 1975, to which the State reluctantly agreed. Portash, however, again failed to comply with this prerequisite (2TH 35-4 to 7).

In a telephone conversation with the investigating deputy attorney general, Alfred Luciani, on the evening of February 4, 1975, Portash's attorney vehemently opposed restitution of the full amount of the money Portash had received after taxes, *i.e.* $24,322, arguing that the sum was just too high. Mr. Luciani later discussed this impasse with the Director of the State Division of Criminal Justice, who conceded that the money differences could be resolved. It was decided that in the meantime the Portash prosecution would be deferred but they would proceed as scheduled to obtain the indictments against Schmertz and Leisure Technology (2TH27-16 to 28-6). As a condition of holding off on Portash's indictment, however, a statement was taken from him the next day, February 5, 1975, in anticipation of his cooperation in the Schmertz trial (2TH14-2 to 15; 20-1 to 22-7).

The non-immunized February 5, 1975 statement generally concerned the circumstances of Portash's employment with the Madison Agency and favorable treatment accorded to Leisure Technology. It included a significant admission by Portash:

> Q. Did you know at that time when you originally accepted the offer that Mr. Schmertz had an interest in Madison Agency?

> A. No, not initially. I didn't know until about two weeks later. (TS3-16 to 20).*

He also admitted correlating in his own mind his employment at Madison Agency and Leisure Technology's application to the Utility Authority for a franchise, stating that it gave him an awkward feeling that he was being used. He felt "obligated to the corporation . . . [b]ecause of the employment at the Madison Agency." (TS12-21 to 13-3; 15-3 to 9). According to his statement, "it was a contributing factor" to his decision on the franchise application (TS15-21). Finally, he again acknowledged fabricating some of the site applications (TS21-13) and the letter justifying his $15,0000 annual salary at Madison Agency (TS25-1 to 26-4).

Later in February 1975, Portash met twice with another deputy attorney general assigned to handle the Schmertz trial to review his anticipated testimony in that case (2TH33-7 to 18). Portash's attorney also met with Deputy Attorney General Luciani to discuss the question of restitution. At that time Portash's attorney indicated that the money question could be negotiated; he also discussed Portash's mental state as well as the terms of his resignation (2TH28-7 to 17). There followed some telephone conferences (2TH35-12), and during the next two or three weeks the State indicated that if it settled the restitution question for $15,000, as proposed by Portash's attorney,

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* In his Appellate Division brief respondent Portash represents that if he had testified at trial, "he would have indicated that he had no knowledge of any connection between Leisure Technology and the Madison Agency at the time of his employment and indeed never learned of the fact that Schmertz [*sic*—Safran] had an equal but silent partner during his employment." (Respondent's Appellate Division brief at p. IV).

the State would require Portash to resign from his position as Executive Director of the Pinelands Environmental Counsel (2TH17-1 to 10; 21-3 to 25; 38-12 to 19). Otherwise the State would stand by its original offer to accept $24,322, resignation from the township committee and position of mayor, and cooperation in the Schmertz and Pinelands Environmental Council cases. The State added the alternative proposal in light of information received during preliminary discussions with Portash which justified Portash's resignation from the other position of public trust (2TH29-3 to 15).

On March 27, 1975 Portash's attorney met with the State's representatives to discuss the alternatives (2TH29-15 to 19). A written document (S-1) incorporating the terms of the proposals was drawn up (2TH36-24 to 37-14). His attorney indicated that Portash was going away for a few days to think it over (2TH35-18 to 20). After Portash returned, his attorney contacted the State's representatives and asked them to talk directly with Portash. The investigating deputy reluctantly agreed to this extraordinary request and spoke with Portash on the telephone for over an hour. Portash indicated that he was troubled about making the right decision, asserting that he had done nothing wrong and that to return the money and resign would be too much for him to bear. Consequently, he rejected both alternatives and decided to defend against the charges (2TH29-20 to 31-8; 35-17 to 36-1).

The State, which had been led to believe by Portash's representations that he would cooperate and abide by the prerequisites throughout the course of the discussions, was left with no recourse but to present the case to the State Grand Jury. The indictment was returned on April 24, 1975 (2TH15-12 to 20; 31-8 to 32-22; 36-1 to 6).

Prior to Portash's trial the defense sought a ruling on the use of respondent's immunized testimony and subsequent statements at the pretrial hearing on December 15, 1975. Defense counsel argued that these materials could be used if respondent took the stand and perjured himself (2TH96-24 to 97-1), but contended that they could not be used otherwise, either on the State's case, cross-examination or rebuttal (2TH97-5 to 13; 102-8 to 10). The court ruled that it would not make an anticipatory evidentiary ruling before trial, although it was inclined to believe that materially inconsistent statements could be used solely for impeachment purpose under the rationale of *Harris* v. *New York*, 401 U.S. 222 (1971) (2TH 102-20 to 109-7). Following this hearing respondent obtained another attorney who was duly substituted as trial counsel.

The defense renewed its request for an anticipatory ruling after completion of the State's case on February 5, 1976, arguing that truthful immunized testimony should be excluded from any use whatsoever and suggesting that the prosecution should be confined to questioning defendant on his limited direct testimony (10T50-17 to 59-18). The prosecution noted that the court was faced with three possible situations: respondent might repudiate his prior testimony as untruthful in whole or part; he might testify in accordance with prior truthful statements, which created no problems; or he might admit that the prior statements were truthful but would testify falsely at trial. Assuming that the court was faced with the last situation, then the State maintained he would be giving advance notice of the intent to perjure himself at trial, which would be a fraud perpetrated on the court in an attempt to secure a deliberately false judgment. The prosecution argued that this situation fell within the ambit of the *Harris* rationale and also noted that if defense counsel knowingly participated in such a fraud, he would be subjecting himself to disciplinary action (10T60-16 to 61-25).

Defense counsel protested that his client would testify only to the truth, would not discuss his grand jury testimony in any way and that, in any event, the only remedy for false testimony would be a subsequent prosecution for perjury or false swearing (10T66-5 to 67-10). The court reiterated that in accordance with *Harris* v. *New York*, the State should be able to impeach with prior materially inconsistent statements (10T70-12 to 72-24), and questioned how it could make an advance ruling on materiality without "digesting the testimony." (10T77-10). Moreover, the prosecution noted that if the defense representations were accurate that respondent would testify truthfully, the whole discussion was academic (10T112-3 to 17). The court concluded that it would defer ruling and handle the matter on a question-by-question basis, requiring questions related to the grand jury testimony to be first posed at side bar for a specific ruling (10T112-18 to 113-12).

Further argument was heard in chambers on February 9, 1976. Defense counsel argued that in view of the number of Portash's statements and conversations after immunity was granted, it would be "nightmarish" for the court to determine consistency and inconsistency unless the court first conducted a *voir dire* of respondent's testimony and make advance rulings on the prosecutor's questions (12T12-13 to 13-25; 50-7 to 51-10). The prosecution objected to a trial run of respondent's testimony or to any attempt by respondent to curtail effective cross-examination based on the State's case-in-chief by limiting the scope of respondent's direct examination (12T52-12 to 53-18; 60-10 to 20). The court observed that respondent could be cross-examined about anything reasonably related to evidence in the case-in-chief separate and apart from the grand jury testimony, and that the court could not give an advance evidentiary ruling on every question posed (12T62-8 to 73-6).

Following a recess defense counsel announced that he could not advise his client to take the stand in light of the court's ruling (12T81-20 to 82-16). Counsel renewed his request for a *voir dire* of defendant's testimony, and the court responded:

> What you're asking the Court for is plenary, evidentiary rulings in advance which the Court, even if it were inclined to do so, is not permitted. There is no such thing as a dry run in a criminal case. (12T91-19 to 22)

The colloquy ended with a representation by defense counsel that it was defendant's decision not to take the stand (12T97-6 to 20). Respondent was subsequently found guilty by the jury of extortion and was given a suspended sentence.

On appeal the Superior Court of New Jersey, Appellate Division held that although the evidence supported the jury's verdict of respondent's guilt, the trial court's ruling which would have permitted the State to use respondent's immunized grand jury testimony for impeachment purposes had impaired respondent's right to testify on his own behalf. The Appellate Division found that in reliance on the trial court ruling and fearful of the use to which the grand jury testimony would be put, respondent decided against testifying. It, therefore, reversed the conviction and remanded for new trial. On January 17, 1978, the Supreme Court of New Jersey dismissed the State's appeal as-of-right and denied the State's petition for certification.

REASONS FOR GRANTING THE WRIT

POINT I

Respondent lost the benefit of privilege against self-incrimination by failing to testify before asserting the right with respect to immunized grand jury statements.

In essence the Appellate Division reversed respondent's conviction because he had "sought the trial court ruling under consideration as a basis upon which to decide whether to testify in his own behalf" and "[i]n reliance thereon, and fearful of the use to which the grand jury testimony would be put, he decided against testifying." In the opinion of the intermediate review court, the verdict was, therefore, based on partial evidence and reversal of the conviction was required. 151 N. J. Super. at 209, 376 A. 2d at 955. The nature of respondent's claim was premised on a mechanistic asserting of the Fifth Amendment privilege against self-incrimination. He contended that if the grant of immunity was to be co-extensive with the privilege, then it would not be constitutional to permit a prosecutor to impeach the testifying defendant with his inconsistent immunized grand jury statements. Nevertheless, it must be emphasized that at no time during the trial did Portash properly invoke his Fifth Amendment privilege. Thus, any potential violation of the privilege is purely speculative. As will be demonstrated, the proceeding in general involved no unfairness, and the due process clause and the Sixth Amendment right were not implicated.

The Fifth Amendment addresses the compulsion of tesmony from a witness. "It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the

privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *Garner* v. *United States,* 424 U.S. 648, 654-655 (1976); *United States* v. *Monia,* 317 U.S. 424, 427 (1943). The privilege against self-incrimination is one which normally must be claimed by the individual who seeks to avail himself of its protection. *Communist Party of United States* v. *Subversive Activities Control Board,* 367 U.S 1,107 (1961). There, this Court recognized that "[m]erely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated." *Id.* at 71. See generally *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288 (Brandeis, J. concurring at 346-348).

So, too, in this case respondent prematurely attempted to assert a Fifth Amendment claim both prior to trial and before deciding whether to testify on his own behalf. Since respondent did not actually testify, it can only be speculated whether he genuinely intended to take the stand or even whether he might not have undergone a last-second change of heart if the court had ruled in his favor, particularly after it was made clear to him that by limiting his testimony to certain matters he could not restrict the State's cross-examination with all the evidence in its case-in-chief. Until respondent took the stand and testified, it was impossible to anticipate the exact content of his testimony or delimit the scope of possible cross-examination based on such direct examination testimony. Thus, it would have been ineffective to conduct any sort of *voir dire* or trial run of respondent's intended testimony, as his counsel requested. It would have been impractical to determine whether respondent's prior statements would be inconsistent with this testimony, and premature to determine whether the immu-

nized grand jury statement was true or false. See *United States* v. *Moss*, 562 F.2d 155 (2d Cir. 1977), *U.S. cert.* filed Nov. 8, 1977 (No. 77-661, 22 *Cr.L.* 4112) (discussed *infra*). It is submitted that the Appellate Division erred in anticipating the constitutional question in advance of the necessity for deciding it, and formulating a broader rule than required by the precise facts to which it applied. See *Ashwander* v. *Tennessee Valley Authority*, *supra*, 297 U.S. at 347-348.

Petitioner submits that the trial court adopted the best course of action under the circumstances, deferring its ruling and requiring the prosecution to pose any questions implicating immunized testimony at side bar out of the hearing of the jury for a ruling on admissibility. Respondent was protected by this procedure and it would have been appropriate for him to press his specific objections at the time when the judge could best and most expeditiously evaluate the issues in the full light of the evidence presented. If the trial court had then rendered a ruling which respondent deemed erroneous, his remedy was to testify truthfully and challenge the ruling on appeal. Instead he adopted a strategy, sanctioned by the Appellate Division, which foreclosed proper consideration of the issue at trial. Respondent's representation that he had decided not to testify based upon the trial court's decision, can only be considered a pretext to undermine the verdict and create a colorable issue on appeal. By refusing to testify respondent lost or waived the benefit of the privilege with respect to his prior immunized testimony. His claim would ripen only after the prosecutor propounded a question involving respondent's immunized grand jury statement. Until then it was of "a hypothetical or abstract character." See *Flast* v. *Cohen*, 392 U.S. 83, 100 (1968); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937). It was specious for him to argue that

the trial court's "ruling prevented him from taking the stand." citing *Dombrowski* v. *Pfister*, 380 U.S. 479 (1975). (Respondent's App. Div. reply brief at p. 4). Petitioner submits that the Appellate Division erred in accepting this rationale. Respondent had the opportunity to testify if he so desired and he received a fair trial.

The claim raised by respondent arises solely under the Fifth Amendment of the United States Constitution, and federal standards must govern in determining the sufficiency and temporal propriety of that claim. Under the facts set forth petitioner submits that respondent has not satisfied the standards established by this Court for a valid assertion of the privilege against self-incrimination.

POINT II

The State should be permitted to impeach a defendant with materially inconsistent statements given after the grant of immunity.

The uncontested facts in this case present a far more complex constitutional issue than the simplistic treatment in the opinion of the Superior Court, Appellate Division. The State reviewing court focused on a significant question which is novel to New Jersey courts but has recurred in other jurisdictions including the federal courts with varying results. Petitioner submits that it is timely for this Court to issue a definitive opinion on the question whether the privilege against self-incrimination shields a defendant if he testifies at trial on his own behalf and his prior inconsistent statements given after the grant of immunity indicates that he may have committed perjury.

Respondent's grand jury testimony was obtained after the State granted him statutory immunity from adverse

use of that testimony in any subsequent prosecution except for contempt, false swearing or perjury. Thereafter, Portash gave a number of statements in anticipation of his cooperation in a co-actor's trial. The power of a court to compel persons to appear and testify in court or before grand juries is firmly established. *United States* v. *Calandra*, 414 U.S. 338, 346 (1974); *Kastigar* v. *United States*, 406 U.S. 441, 444 (1972). The duty to testify has long been recognized as a basic obligation that every citizen owes to his Government. The general common law principle that "the public has a right to every man's evidence" is particularly applicable to grand jury proceedings. *Calandra* and *Kastigar*, both *supra*. This power is necessary to assure the effective functioning of government since such testimony constitutes one of the Government's primary sources of information. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 93-94 (1964). More specifically, the grand jury occupies a special role in insuring fair and effective law enforcement: it does not adjudicate but investigates to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigatory power must be broad if its public responsibility is adequately to be discharged. *United States* v. *Calandra*, *supra* at 344-345; *Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972). The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered, even information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination. *United States* v. *Calandra*, *supra* at 345-346; *Lawn* v. *United States*, 355 U.S. 339 (1958).

Of course, the grand jury's power is not unlimited. As explained in *Calandra*, the grand jury may consider incompetent evidence but it may not itself violate a valid

privilege, constitutional or otherwise, such as forcing a witness to answer questions in violation of his Fifth Amendment privilege against self-incrimination. Rather, the grand jury may override a valid Fifth Amendment claim only if the witness is granted immunity co-extensive with the privilege against self-incrimination. 414 U.S. at 347; see *Kastigar* v. *United States*, *supra*. Immunity statutes have historic roots deep in Anglo-American jurisprudence and are not incompatible with the values underlying the Fifth Amendment privilege. Such statutes seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. Their existence reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. *Id.* at 446-447.

New Jersey has enacted an immunity statute relating to the duty of every public employee to appear and testify before the grand jury on matters directly related to the conduct of his office. N.J.S.A. 2A:81-17.2(a)(2). This statute complies with constitutional principles. *Zicarelli* v. *New Jersey State Commission of Investigation*, 406 U.S. 472 (1972).

It is significant that both the federal and the New Jersey immunity laws exclude from protection perjured testimony. This Court has stated that the privilege against self-incrimination "does not condone perjury." *United States* v. *Wong*, —— U.S. ——, 97 S.Ct. 1823, 52 L.Ed.2d 231 (1977). It grants a privilege to remain silent without risking contempt, but it "does not endow the person who testifies with a license to commit perjury." *Id.*; *Glickstein* v. *United States*, 222 U.S. 139 (1911). As this Court held in *United States* v. *Mandujano*, 425 U.S. 564,

576-577 (1976), immunity supplants the privilege against self-incrimination and "[i]n this constitutional process of securing a witness' testimony, perjury has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are, therefore, imperative. * * * [O]ur cases have consistently —indeed without exception—allowed sanctions for false statements or perjury. . . . Even where a statutory scheme granted blanket immunity from further use of the testimony, the Court has found perjured statements to fall outside the grant."

The facts in this case present a classic example of a defendant who has been granted immunity for his grand jury testimony and at trial intends to testify in a materially inconsistent fashion with the statements given after the immunity grant.

Petitioner contends that a defendant who takes the stand on his own behalf at trial waives his privilege against self-incrimination guaranteed by the Fifth Amendment. *E.g., Doyle* v. *Ohio*, 426 U.S. 610 (1976) (Stevens, J., dissenting at 633); *McGautha* v. *United States*, 402 U.S. 183, 216 (1971); *Harrison* v. *United States*, 392 U.S. 219 (1968); *Brown* v. *United States*, 356 U.S. 148, 155-156 (1958); *Raffel* v. *United States*, 271 U.S. 494 (1926). This waiver is total (*Raffel, supra*) since any voluntary disclosure by the accused is likely to distort the probative picture. The defendant "has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute." *Brown* v. *United States, supra.* The Court in *Brown* concluded,

> It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell. '[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.' *Walder* v. *United States,* 347 U.S. 62, 65, 74 S.Ct. 354, 356, 98 L.Ed. 503. The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination. (*Id.*)

Petitioner submits that the only effective sanction for a defendant's perjury under these circumstances is confrontation with his prior inconsistent statements. As noted in *Brown*:

> Striking the witness' testimony, or relying on the trier of fact to take into account the obvious unfairness of allowing the witness to escape cross-examination, must often in practice be poor substitutes for a positive showing under searching cross-examination that the testimony is in fact false. (*Id.* at 156 n 5)

Often a perjury prosecution by itself will not be an effective sanction; the prosecuting attorney should be permitted to conduct a probing, prying and pressing form of inquiry to expose falsehood and evasion to the jury and "to bring the witness back to the mark, to flush out

the whole truth with the tools of adversary examination." *Bronston* v. *United States,* 409 U.S. 352, 359-360 (1973).

The State believes that apposite analogy may be made to *Oregon* v. *Hass,* 420 U.S. 714 (1975); *Harris* v. *New York,* 401 U.S. 222 (1971) and *Walder* v. *United States,* 347 U.S. 62 (1954). In *Harris* the defendant had been interrogated by the police who had failed to advise her of the right to appointed counsel in accordance with *Miranda* v. *Arizona,* 384 U.S. 436 (1966). The prosecution made no effort in its case-in-chief to use the statement, but after defendant testified in her own behalf, used it to impeach her. The Court held that evidence inadmissible against an accused in the prosecution's case-in-chief is not barred for all purposes, provided that it is trustworthy. It reasoned,

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. (citations omitted). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devises of the adversary process. • • •
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. (401 U.S. at 226-227)

It does no violence to the privilege that a person's choice to testify in his own behalf may open the door to otherwise inadmissible evidence which is damaging to his case. *McGautha* v. *California, supra,* 402 U.S. at 214. The immunity afforded by the constitutional guarantee relates to

the past and does not endow the person who testifies with a license to commit perjury. *Glickstein* v. *United States,* 222 U.S. 139, 142 (1911); see also *United States* v. *Bryan,* 339 U.S. 323, 340-341 (1950).

In a situation which may be compared to this case the defendant in *People* v. *Coleman,* 13 Cal.3d 867, 120 Cal. Rptr. 384, 533 P.2d 1024 (Sup. Ct. 1975) appealed from an order revoking probation, contending that the revocation of his probation in advance of trial on independent criminal charges denied him procedural due process because he was forced to forego his opportunity to testify in his own behalf at his revocation hearing in order to avoid incriminating himself at his pending trial. Recognizing possible tensions between constitutional rights, the California court invoked its supervisory power and ruled that "upon timely objection the testimony of a probationer at a probation revocation hearing held prior to the disposition of criminal charges arising out of the alleged violation of the conditions of his probation, and any evidence derived from such testimony, is inadmissible against the probationer during subsequent proceedings on the related criminal charges, save for purposes of impeachment or rebuttal where the probationer's revocation hearing testimony or evidence derived therefrom and his testimony on direct examination are so clearly inconsistent as to warrant the trial court's admission of the revocation hearing testimony or its fruits in order to reveal to the trier of fact the probability that the probationer has committed perjury at either the trial or the revocation hearing." (120 Cal.Rptr. at 402). The California court explained that no purpose would be served by precluding use of that testimony or its fruits to impeach or rebut clearly inconsistent testimony which the probationer volunteers at his trial:

The intent of our exclusionary rule regarding probation revocation hearing testimony is to encourage the fullest possible truthful disclosure of relevant facts and circumstances at the revocation hearing by allowing a probationer who does testify at his revocation hearing nonetheless to enjoy unimpaired the full protection of the privilege against self-incrimination at his subsequent trial. This privilege requires the prosecution to prove a defendant's guilt through evidence accumulated through its investigative efforts and not extorted from the defendant himself. While the privilege against self-incrimination does assure an accused of the right to remain silent at his trial, it does not—at least under modern principles of Anglo-Saxon jurisprudence (*cf. United States* v. *Grunewald* (2d Cir. 1956) 233 F.2d 556, 587-592 (appendix to dissenting opinion of Frank, J.), revd. (1957) 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931)—encompass a right of an accused to lie in his own behalf at trial. (See *People* v. *Barnes* (1966) 240 Cal.App.2d 428, 430-433, 49 Cal.Rptr. 470).

Cf. United States v. *Kahan,* 415 U.S. 239 (1974).

In *United States* v. *Tramunti,* 500 F.2d 1334 (2d Cir. 1974), the defendant was prosecuted for perjury committed when he testified as a witness on his own behalf at a previous trial for conspiracy, mail and stock fraud. On cross-examination the Government sought to impeach Tramunti's testimony with a transcript of his testimony before a grand jury under grant of use immunity. On appeal the Circuit Court explained that the theory of immunity statutes is that in return for the surrender of the Fifth Amendment right, the witness is promised that he will not be prosecuted based on the inculpatory evidence

he gives in exchange. The bargain struck is conditional, however, upon the witness who is under oath telling the truth. According to the court,

> If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth which the Constitution was intended to protect. Thus, the agreement is breeched and the testimony falls outside the constitutional privilege. Moreover, by perjuring himself the witness commits a new crime beyond the scope of the immunity which was intended to protect him against his past indiscretions. (*Id.* at 1342)

The court concluded that immunity does not extend *in futuro* to another crime not existing when the immunity was offered. It also rejected Tramunti's contention that the immunity statute should not be interpreted to permit the use of the testimony in other criminal trials not based on the original perjurious statements. Noting that there was square authority that the listing of exceptions in the immunity statutes for subsequent criminal prosecutions is not intended to be an exclusive enumeration, the court held that "[t]he failure to include in the exceptions to the statute the use of false testimony to attack credibility or demonstrate the commission of prior similar acts does not prevent such use." (500 F.2d at 1345)

In accord with *Tramunti* is *United States* v. *Moss,* 562 F.2d 155 (2d Cir. 1977), U.S. *cert.* filed Nov. 8, 1977 (No. 77-661, 22 Cr.L. 4112). At issue in *Moss* was whether testimony given under the use immunity provision of the Bankruptcy Act may be used for impeachment purposes at a subsequent trial for the substantive offense of bankruptcy fraud if the defendant takes the stand and no

objection to such use was raised. Relying on *Harris* v. *New York, supra* and *Walder* v. *United States, supra,* the prosecution contended that the immunized testimony could be used for impeachment on cross-examination even though it could not have been used as direct evidence. The court observed that the immunity grant does not protect perjury committed before trial under "immunity" any more than exclusionary rules protect perjury committed at trial. Since the appellant conceded that significant parts of this immunized testimony were perjured, the court held that the use immunity had been dissipated so far as the testimony was willfully false, and the acknowledgment by the defendant that it was perjurious rendered it usable at the trial on both the substantive offense and for perjury. In *dicta,* however, the court in *Moss* rejected the Government's contention that the *Harris-Walder* line sanctions a general use of immunized testimony for impeachment purposes. The court opined that only where perjury is committed does the exception prevail, citing *United States* v. *Hockenberry,* 474 F.2d 247 (3rd Cir. 1973) for the proposition that even in a trial for having made false declarations before a Grand Jury, the use of truthful immunized statements on cross-examination is not sanctioned. (562 F.2d at 165). Significantly, the prosecution in *Moss* was not for perjury, in which the jury determines whether the immunized testimony was perjurious directly by its verdict. On the substantive offense the perjury was collateral and not directly decided by the jury. The *Moss* court opined that to find in such a prosecution that particular immunized testimony was perjurious requires some preliminary finding of fact, or clear documentary evidence as in *United States* v. *Kahan, supra,* 415 U.S. 239, or as in both *Moss* and *Tramunti,* later objective proof. It left unresolved whether in the normal case a trial judge can resolve in advance, without conducting a mini-trial, that the immunized testimony was willfully false. (562 F.2d at 165).

Both respondent and the Appellate Division relied on *United States* v. *Hockenberry, supra* as authority precluding the use of immunized testimony for impeachment purposes. In *Hockenberry* the defendant, a former county detective, was charged with falsely testifying before the grand jury after receiving immunity. Hockenberry took the stand in his own defense and denied knowledge of or connection with bribes or payoffs to county detectives by persons engaged in unlawful gambling and prostitution. On cross-examination the Government impeached him with other truthful immunized grand jury admissions that he had falsely asserted personal knowledge of facts in search warrant applications. The issue was whether the trial court erred in permitting use for impeachment purposes of such immunized testimony which was not material to the crime at issue. The court held that "the immunity statute properly permits prosecution for perjury committed in an otherwise immunized statement and also the introduction in evidence of so much of the statement as is essential to establish the *corpus delecti.*" (*Id.* at 249). It rejected, however, the Government's contention that it could use any truthful admission of wrongdoing made in an immunized statement to discredit the witness, since such an interpretation of the immunity statute would "jeopardize its adequacy as a constitutional means of requiring self-incrimination." (*Id.* at 250).

The court in *Hockenberry* gave short shrift to the Government's reliance on *Harris* v. *New York, supra,* and was unable to appreciate the difference between adverse use of the inconsistency on the Government's direct case to prove a *prima facie* case and its more limited reception for impeachment purposes in response to the defendant's

false testimony. It premised its opinion on the generality that immunity must be coextensive with the privilege, but failed to recognize the important caveat that the privilege does not protect perjury *in futuro*, another crime that did not exist when immunity was granted. Furthermore, it did not anticipate the situations in *Tramunti* and *Moss*, where the defendants' grand jury testimony was also false. Rather, it was primarily concerned with the use of non-material immunized testimony containing a truthful admission of wrongdoing. Petitioner submits that Hockenberry is factually and legally distinguishable from the complex situation presented by this case and that these differences significantly effect the constitutional issues presented. Moreover, it is submitted that *Hockenberry* enunciates a more stringent standard than is required by the Constitution, and it need not be extended to the states.

When Portash testified on November 14, 1974, before the State Grand Jury after grant of immunity, his testimony was restricted for the most part to admission that the documents he had submitted under subpoena had been fabricated by him after the State Police began investigating him in 1972 (3TGJ4-5 to 15-3). Portash subsequently repeated these admissions and gave more damaging statements in conjunction with the "charge bargaining" discussions in anticipation of his cooperation in the Schmertz trial. It was uncontested before the trial court and the State Supreme Court that these latter statements were not immunized. Since respondent revealed this information he lost the privilege. *Garner* v. *United States, supra,* 424 U.S. at 653. As noted in petitioner's brief to the Supreme Court of New Jersey (n. at p. 16), the State in its case-in-chief introduced independent evidence of the fabricated documents which was the central focus of defendant's immunized State Grand Jury testimony. It

would have been futile and unlikely for defendant to recant that testimony at trial, and it was not realistically anticipated by the State. Rather, respondent revealed the underlying cause for his motions in his Appellate Division brief (at p. IV): both he and the State (See, *e.g.,* 2TH31-21) were primarily concerned with the use of the more damaging nonimmunized statements taken subsequently to the grand jury testimony, including the statement of February 5, 1975. In that statement Portash admitted that he had first learned that Schmertz had an interest in Madison Agency about two weeks after he accepted the offer of employment (TS3-16 to 20). Even this admission may have understated his knowledge and thus may have been false. In his appellate brief Portash acknowledged his intention to contradict this prior statement by testifying at trial that "he had no knowledge of any connection between Leisure Technology and the Madison Agency at the time of his employment and indeed never learned of the fact that Schmertz [*sic*—Safran] had an equal but silent partner during his employment."

It is evident that when respondent asserted his premature claim before the trial court, it was faced with a much more difficult question than that left open in *United States* v. *Moss, supra.* There were a number of pretrial statements involved, not all of which were immunized. The trial judge had deferred its ruling and stated that it would handle the matter after respondent's direct testimony, on a question-by-question basis, requiring the questions related to the grand jury testimony to be first posed at side bar (10T112-18 to 113-2). The trial court intended to make preliminary findings of relevancy, materiality and to weigh its probative value against potential prejudice (10T112-18 to 113-12). This ruling does not contravene the procedure discussed in *Moss.* Petitioner advocates that it was permissible to utilize the immunized

testimony if respondent had testified in an inconsistent fashion. However, even if petitioner was limited to utilizaing false immunized testimony, a hearing on its admissibility did not have to be held until respondent took the stand on his own behalf. To mandate any other procedure would convert the shield of the privilege against self-incrimination which protects the liberty of individual citizens into a sword to destroy the integrity of the judicial system.

CONCLUSION

For these reasons, a w of certiorari should issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

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Of Counsel and on the Petition

APPENDIX

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—June 29, 1977)

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH S. PORTASH,

Defendant-Appellant.

A-2848-75

Argued May 23, 1977—Decided Jun 29 1977

Before Judges Bischoff, Morgan and King.

On appeal from Superior Court, Law Division, Ocean County.

Mr. Michael E. Wilbert argued the cause for appellant (Messrs. Wilbert, Clyne & Montenegro, attorneys).

Mr. Benjamin D. Leibowitz, Deputy Attorney General, argued the cause for respondent (Mr. William F. Hyland, Attorney General of New Jersey, attorney).

Opinion of the Superior Court of New Jersey, Appellate Division

The opinion of the court was delivered by

MORGAN, J.A.D.

In this appeal from his conviction of statutory extortion (N.J.S.A. 2A:105-1) defendant challenges a trial court ruling permitting State use of defendant's granted jury testimony, compelled under a grant of immunity, as a means of impeaching the credibility of his trial testimony. In reliance upon this ruling defendant declined to testify in his own behalf. We reverse.

According to the State's theory of the case which the jury apparently accepted, defendant Joseph S. Portash, while a member of the Ocean County Board of Freeholders, a member of the Manchester Township Committee and a member of the Manchester Municipal Utilities Authority, accepted approximately $31,730 from one Donald Safran, trading as the Madison Agency, Inc. (Agency), a real estate and insurance company in Ocean County. Although this money was supposed to have been given in payment for services rendered by defendant, the evidence adduced suggested that no such services were performed and that, in fact, the Agency was covertly acting as a mere conduit for transmission of the money from another company, Leisure Technology Corporation (Leisure), a major real estate developer in Ocean County, which received favorable treatment by the public bodies on which defendant served.

Because disposition of this appeal turns on the permitted use of defendant's compelled and immunized grand jury testimony, it is unnecessary for us to recount in detail the considerable testimony adduced during the 16-day jury trial which, in our view, and contrary to defend-

Opinion of the Superior Court of New Jersey, Appellate Division

ant's contentions, adequately supports the jury's verdict of defendant's guilt. The facts surrounding the immunity granted defendant are, however, brief and undisputed.

On November 6, 1974 defendant appeared, with counsel, before a State Grand Jury investigating Robert Schmertz, Leisure's president, and Safran, Agency's principal, in response to a subpoena served upon him on October 29, 1974, and expressed his intention of claiming the Fifth Amendment privilege against self-incrimination. Subpoenaed again for November 14, 1974, defendant was granted immunity in the following terms:

> We have agreed that the testimony that Mr. Portash is about to give before the Grand Jury, under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury. No representations have been made insofar as prosecution for any offenses for which evidence has already been presented to a State Grand Jury, a separate Grand Jury from the one Mr. Portash is about to appear before.

Defendant was asked whether he understood the purport of this agreement.

> Mr. Luciani: Mr. Portash, do you understand—have you discussed this matter with your attorney?
>
> Mr. Portash: I believe so.
>
> Mr. Luciani: And you understand the fact that nothing you are about to testify to can be used against you, personally, in any subsequent criminal prosecution?

Mr. Portash: To the best of my knowledge of legal matters, yes.

Following statement of this agreement, defendant testified. Thereafter continued negotiations between defendant's counsel and the State ensued with the objective of terminating defendant's exposure to prosecution in return for his restitution of the monies received and resignation from office. No agreement was reached in this regard and defendant was thereafter indicted on information derived from sources unconnected with his grand jury testimony. Defendant does not challenge the indictment underlying this case as being derived even indirectly from his compelled grand jury testimony.

After completion of the State's case, defendant sought a ruling from the trial court as to whether the State would be permitted to use his grand jury testimony in cross-examination in the event he chose to testify in his own behalf. Following extended argument, the trial court ruled that if defendant testified and were asked a question on either direct or cross-examination which elicited a response materially inconsistent with his prior testimony before the grand jury and relevant to the issues at trial, then the State would be permitted to refer to that portion of the grand jury testimony in its cross-examination. It was in reliance upon this ruling that defendant declined to testify on his own behalf.

The statutory authority for the State's grant of immunity to defendant, N.J.S.A. 2A:81-17.2a2, reads as follows:

> If any public employee, having claimed the privilege against self-incrimination, testifies before any court, grand jury or the State Commission of Investigation after having been informed that his failure to appear and testify would subject him to removal from his office, position or employment, such testimony and the evidence derived therefore shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury or false swearing committed while so testifying.

Clearly, the grant of immunity appearing on the record of the grand jury proceedings at which defendant testified was in strict accordance with this statutory authority and resulted in precluding use of the compelled testimony or evidence derived therefrom in any subsequent criminal proceeding against defendant.

The State contends that a grant of use immunity pursuant to N.J.S.A. 2A:81-17.2a2 only precludes use of the compelled testimony as part of the State's affirmative case against the witness; not precluded is its use for impeaching the credibility of the witness, later a defendant, who testifies at variance therewith. To hold otherwise would, in the State's view, confer a license to commit perjury. We disagree with the State's definition of the scope of protection afforded by use immunity and the consequences feared from rejection of its position.

A valid claim of the Fifth Amendment privilege against self-incrimination made before a grand jury will, of course, be honored and the witness claiming it cannot be required to testify. Because of the imperatives of investigation, however, the device of immunizing such testimony from

later use against the witness in a subsequent criminal proceeding was fashioned as a means of compelling such otherwise privileged testimony without compromising the integrity of the constitutional protection afforded by the Fifth Amendment and cognate state constitutional guarantees. The immunity device, however, will only be deemed a sufficient answer to a claim of privilege if the scope of immunity afforded is commensurate in all respects with the privilege against self-incrimination which it replaces. *United States* v. *Calandra,* 414 U.S. 338, 346 (1974); *Kastigar* v. *United States,* 406 U.S. 441, 459 (1972). In order for a grant of immunity to pass constitutional muster as an adequate substitute for the self-incrimination privilege, it must leave the witness whose testimony has been compelled and the prosecutorial authorities "in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Kastigar* v. *United States, supra* at 462.

The essential inquiry here, therefore, is whether the proposed use of the immunized grand jury testimony to impeach defendant's trial testimony would leave defendant and the State in the position each would have occupied had defendant's claim of privilege been honored. That inquiry can only be answered in the negative. Had defendant been permitted to refuse testimony before the grand jury on his claim of privilege, the present argument by the State could not even have been made: no testimony to be used for impeachment purposes would have existed. Had defendant's testimony not been compelled, he would have been able to testify at his trial free from the fear engendered by the possible use of prior inconsistent testimony for purposes of impeachment. It necessarily follows

that if the grant of immunity is to be viewed as commensurate with the lost privilege against self-incrimination, then he should be accorded the same freedom to testify in his own behalf at trial as he would have enjoyed had he been permitted to remain silent before the grand jury.

A similar issue was considered and disposed of in *United States* v. *Hockenberry,* 474 F. 2d 247 (3 Cir. 1973). In *Hockenberry,* the prosecution used immunized grand jury testimony given by Hockenberry to impeach his credibility at his trial on a charge of some other wrongdoing. The conviction was reversed on the ground that the immunized testimony could not be so used without jeopardizing the adequacy of the immunity as a constitutional means of compelling self-incriminatory testimony. The court in *Hockenberry* observed in terms pertinent to the present matter:

> But for the grant of immunity Hockenberry would have been privileged to refuse to admit to the grand jury his wrongdoing in the execution of affidavits to obtain search warrants. And if immunity that deprived him of that privilege is to be, as constitutionally it must, co-extensive with the privilege itself, his compelled admission of wrongdoing cannot later be used to discredit his effort to defend himself against a charge of some other wrongdoing. [*Id.* at 250].

In this case, unlike *Hockenberry,* the immunized testimony was sought to be used to discredit defendant's effort to defend himself with respect to the very matters about which his testimony was compelled. The argument for excluding such testimony is, therefore, even more compelling in this case than it was in *Hockenberry.*

The State's reliance upon *Harris* v. *New York*, 401 U.S. 222 (1971), and its progeny as an analogy to the issue under consideration is inappropriate. *Harris* held that defendant's voluntary incriminating statement, although inadmissible as part of the State's case in chief because obtained without *Miranda* warnings having been given, can be used to test defendant's credibility if he chooses to testify in his own behalf at the trial. The difference between the *Harris*-type case and the present case is obvious. In *Harris*-type situations the statement sought to be used for impeachment has been voluntarily given; in the present case the testimony was judicially compelled under a promise of immunity the State now wishes to modify after the testimony has been given. In *Harris*, the statement was not made in reliance upon warnings never given; here, the testimony was compelled upon the State's promise that the testimony judicially coerced would not be used "in any respect." *Kastigar* v. *United States*, *supra* at 453. The question is whether the State should be required to honor its promise, expressed in its statute and explicated in leading cases defining the required scope of immunity, not to use the testimony compelled in any subsequent criminal proceeding against the defendant, except in circumstances not here pertinent.[1] In our view, the *quid pro quo* for depriving defendant of his self-incrimination privilege should be exacted and the trial court erroneously ruled otherwise.

We agree with the State that forbidding use of immunized testimony for impeachment purposes impedes disclosure of truth. No one, however, has ever claimed for the privilege against self-incrimination the effect of revealing truth; its substitute, use immunity, has of course the same effect. Clearly invocation of a valid claim of privilege results in a partial suppression of facts relevant to a given issue and to that extent results in obscuring the truth of the matter. It is, however, in the "fundamental values and most noble aspirations" which underlie that zealously safeguarded Fifth Amendment privilege (and the immunity which stands in its place) that the courts have discerned the fully justifiable basis for partially sacrificing the truth-seeking quest which is the essential business of a criminal trial. See *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964). Indeed, all privileges suppress truth in the service of other equally regarded values.

[1] i.e. in a charge for perjury or false swearing in giving the compelled testimony.

The State further contends that precluding use of immunized testimony for impeachment purposes "would leave the State without any remedy against defendant's trial perjury." Without commenting upon the overstatement inherent in this contention, we can concede that this statement is substantially so. It would have been equally so, however, had the State declined to compel defendant to give testimony under a promise of immunity. Had defendant been permitted his silence before the grand jury, the testimony which the State sought to use for impeachment purposes would not even exist and the State would have been just as disabled from testing defendant's credibility as it is when it is precluded from using the testimony it chose to compel. Clearly, in the very statement of its position, the State is seeking benefit from the immunized testimony it would not have enjoyed had defendant been permitted to remain silent as he was privileged to do.

Indeed, immunized testimony cannot be used as evidence of perjury or false swearing in giving nonimmunized testimony. *State* v. *Williams*, 59 N. J. 493, 500 (1971). Hence, a breach of immunity will not be countenanced even as a prophylactic measure designed to prevent perjury or to insure the giving of truthful testimony, the specific purpose for which the State intended to use the testimony in the present case.

Although we agree with the State's assertion that a deliberately false statement debases the judicial process, so does the State's failure or refusal to honor its voluntary commitments. The State was free to act as it chose; it was under no compulsion to grant immunity. Defendant, however, enjoyed no such freedom. Once the State granted immunity, his privilege against self-incrimination was gone, only because the immunity granted was supposed to have been commensurate in its protection with the lost privilege. To accept the State's position, in our view, would constitutionally impair the privilege and render suspect the immunity which must by constitutional command afford precisely the same degree of protection.

Defendant sought the trial court ruling under consideration as a basis upon which to decide whether to testify in his own behalf. In reliance thereon, and fearful of the use to which the grand jury testimony would be put, he decided against testifying. The jury, therefore, decided the case on the basis of partial evidence. We have no doubt the erroneous ruling of the trial court requires reversal of the conviction and a new trial for defendant.

Because of our ruling, it is unnecessary for us to consider the many other claims of error asserted by defendant. The conviction is reversed and the matter remanded to the trial court for a new trial.

Notice of Petition for Certification

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION—DOCKET NO. A-2848-75

Criminal Action

(Filed—July 20, 1977)

STATE OF NEW JERSEY,

Plaintiff-Petitioner,

v.

JOSEPH S. PORTASH,

Defendant-Respondent.

To: Michael E. Wilbert, Esq.
Wilbert, Clyne & Montenegro
254 Brick Blvd.
Brick Town, New Jersey 08723

PLEASE TAKE NOTICE that the State of New Jersey petitions the Supreme Court of New Jersey for certification to the Superior Court, Appellate Division from its judgment by the Honorables William G. Bischoff, P.J.A.D., Sonia Morgan and Michael P. King, J.J.A.D., entered on June 29, 1977, which reversed defendant's conviction of

Notice of Petition for Certification

statutory extortion (N.J.S.A. 2A:105-1) by the Honorable William E. O'Connor, J.S.C. and a jury and remanded to the trial court for new trial.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Plaintiff-Petitioner
By: RICHARD W. BERG
Deputy Attorney General

Dated: July 18, 1977

Notice of Appeal to the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

APPELLATE DIVISION—DOCKET NO. A-2848-75

Criminal Action

(Filed—July 20, 1977)

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

JOSEPH S. PORTASH,

Defendant-Respondent.

To: Michael E. Wilbert, Esq.
Wilbert, Clyne & Montenegro
254 Brick Blvd.
Brick Town, New Jersey 08723

PLEASE TAKE NOTICE that the State of New Jersey appeals to the Supreme Court of New Jersey pursuant to R. 2:2-1(a)(1) from the judgment of the Superior Court, Appellate Division by the Honorables William G. Bischoff, P.J.A.D., Sonia Morgan and Michael P. King, J.J.A.D.,

Notice of Appeal to the Supreme Court of New Jersey

entered on June 29, 1977, which reversed defendant's conviction of statutory extortion (N.J.S.A. 2A:105-1) by the Honorable William E. O'Connor, J.S.C. and a jury and remanded to the trial court for new trial.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Plaintiff-Appellant
By: RICHARD W. BERG
Deputy Attorney General

Dated: July 18, 1977

Order of the Supreme Court of New Jersey Denying Certification

SUPREME COURT OF NEW JERSEY

C-204—SEPTEMBER TERM 1977

(Filed—January 17, 1978)

STATE OF NEW JERSEY,
Plaintiff-Petitioner,

v.

JOSEPH S. PORTASH,
Defendant-Respondent.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied.

WITNESS, the Honorable Mark A. Sullivan, Presiding Justice, at Trenton, this 17th day of January, 1978.

STEPHEN W. TOUNSEND
Acting Clerk

Order of the Supreme Court of New Jersey Dismissing Appeal

SUPREME COURT OF NEW JERSEY

13,994—September Term 1977

(Filed—January 17, 1978)

State of New Jersey,

Plaintiff-Appellant,

v.

Joseph S. Portash,

Defendant-Respondent.

This matter having been duly presented to the Court, it is Ordered that the appeal is dismissed pursuant to Rule 2:12-9.

Witness, the Honorable Mark S. Sullivan, Presiding Justice, at Trenton, this 17th day of January, 1978.

Stephen W. Tounsend
Acting Clerk

Judgment of the Ocean County Court, Law Division

COUNTY COURT OF OCEAN COUNTY

Law Division

(Criminal)

(Filed—April 24, 1975)

State of New Jersey,

v.

Joseph S. Portash,

No. SGJ # 27-75-10

Indictment for

Misconduct in Office
NJS 2A:85-1 Count 1

Accusation for

Unlawful Takings
NJS 2A:105-1 Count 2

Filed 4/24/75 Received in Ocean County 7/30/75
(Change of Venue from Mercer County)

Judgment of the Ocean County Court, Law Division

Arraignment 4/25/75 Mercer County

Plea of Not Guilty—4/25/75

Trial 1/19/76; 1/20/76; 1/21/76; 1/22/76; 1/23/76; 1/26/76; 1/27/76; 1/28/76; 1/29/76; 2/3/76; 2/4/76; 2/5/76; 2/6/76; 2/9/76; 2/10/76; 2/11/76;

Verdict of Not Guilty to count 1 Guilty to count 2 2/11/76 Jury polled. Unanimous. Bail cont'd.

Sentence of Court imposed on 3/12/76; as follows:

The Court sentenced the Defendant to (6) months in the Ocean County Jail, suspended the sentence and placed the Defendant on (1) year probation (non-reporting). The Court fined the Defendant $1,000.00 which shall be paid during the probation period.

Reason for Sentence: The Court is confronted with a tragic situation. Young man found guilty of a violation which does not require that he be aware that the offense was a crime. Accordingly, does not require rehabilitation. He has suffered punishment through the entire process of being placed on trial. Deterrence factor remains to be disposed of.

WILLIAM E. O'CONNOR, JR.
Judge